IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 16, 2008 Session

STATE OF TENNESSEE v. MATTHEW KIRK MCWHORTER

Direct Appeal from the Circuit Court for Montgomery County
No. 49900104 John H. Gasaway, III, Judge

No. M2007-02256-CCA-R3-CD - Filed December 8, 2008

A Montgomery County jury convicted the Defendant of rape of a child, and the trial court sentenced him to serve a twenty-three year sentence. On appeal, the Defendant claims: (1) there was insufficient evidence to support the conviction of rape of a child; (2) the trial court erred by admitting the Defendant's confession and statements; (3) the trial court erred by letting the jury members see the Defendant in shackles; (4) the trial court erred by allowing the jury to deliberate after it reported being deadlocked; and (5) the trial court erred when it enhanced the Defendant's sentence and ordered him to serve it consecutively to the sentences he was already serving. After a thorough review of the record and the applicable law, we affirm the trial court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and J.C. MCLIN, JJ., joined.

Stephanie D. Ritchie, Clarksville, Tennessee (on appeal); Worth Lovett, Clarksville, Tennessee (at trial) for the Defendant, Matthew Kirk McWhorter.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Clarence E. Lutz, Assistant Attorney General; John W. Carney, District Attorney General; Art Bieber, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

At trial, the State presented the following evidence: C. A.[1], age fourteen, testified that the Defendant forced him to perform fellatio on the Defendant. C.A. recounted that "around first and second" grade, neighbor Daniella Farr moved near his house with her two sons. C.A. recalled that, at some point, the Defendant began living with Farr. During this time period, the Defendant would come to C.A.'s house "[e]very other day." One of those times, the Defendant was alone with C.A. and C.A.'s younger brother while their parents were at the hospital with their sister. C.A. said that, during the nighttime, the Defendant came to him and "put his private in my mouth." After the initial penetration of his penis, the Defendant told C.A., "to keep sucking." C.A. testified that, after he performed fellatio on the Defendant, "something came out of [the Defendant's penis]." C.A. spit the "whitish, yellowish" substance out on his shorts and then "went to the bathroom to clean it off." C.A. recalled that the substance "[t]asted nasty and it was slim[e]y." C.A. said he could not remember if the Defendant told him not to tell anyone. C.A. explained that, after the police informed his mother that they had the Defendant in custody, he finally told her about the Defendant's conduct because he "wasn't scared" of the Defendant anymore.

On cross-examination, C.A. said that he first learned about sex from the Defendant. He said that he had not seen any "sex pictures" or pornographic films. C.A. could not recall what day or month the Defendant initiated the sexual contact. He remembered he was playing in the dark with his toys when the Defendant entered the room "[a]nd he started the stuff."

Michelle Ayers, C.A.'s mother, testified that she and her family moved to their home on May Apple Drive in Montgomery County when C.A. was two-and-a-half years old. She said that the Defendant lived at her house for a "few days," and then he lived with neighbor Farr. The Defendant continued to come to her house "[a] couple times a week" to "[j]ust hang out" with her family. Ayers recalled that in May 1998 she washed a pair of C.A.'s pants that she "thought had Shout [a stain remover] on them." She explained that Shout has a "whitish gray" color. Ayers admitted that the Department of Children's Services ("DCS") intervened in her family twice in 1997. She said that "one involved when [her younger son] had pulled a coffee pot cord on him and burned his arm" and that "the other one [occurred after C.A. was] beaten up at the bus stop . . . . And my husband had thrown a spaghetti scooper and hit him in the head."

Pertaining to the events in this case, Ayers said that the police came to her house looking for the Defendant, and they asked her to take C.A. to DCS for an interview. Ayers took C.A. for the interview, and, after that interview, C.A. told her that the Defendant "did some things to him" and that "he was scared." Ayers reported to DCS that C.A. "was talking," and she took him for a second interview. Ayers acknowledged that C.A. had been diagnosed with either Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder, but she said she did not permit him to take his prescribed medication.

[1]Due to the age of the victim and the nature of the offense, we will use initials to protect his privacy.

In cross-examination, Ayers testified that, when the police officers came to her door, they told her they "believe[d] that [her] son ha[d] been sexually molested." They also told her that the Defendant admitted "doing something" with C.A. She stated that C.A. initially denied any inappropriate touching and that he has made false accusations in the past. Ayers added that C.A. had not shown signs of sexual abuse but that she did not know what such signs would be. Ayers said C.A. was in counseling for about six months following the accusations. Additionally, she testified that C.A. had inappropriately touched his sister.

Investigator Billy Batson with the Montgomery County Sheriff's Department testified that in July 1998 he met Special Agent Mike Ellis of the Florida Department of Law Enforcement ("FDLE") to investigate the allegations of sexual abuse against the Defendant. Investigator Batson accompanied Agent Ellis to the Ayers house when they informed Ayers that C.A. might have been sexually abused. Investigator Batson first interviewed C.A. at the Department of Human Services in Clarksville with DCS worker Deanna Graves. Graves was the lead interviewer because Investigator Batson had no formal training for interviewing children who might have been sexually abused. C.A. initially denied any touching, and so there were no further plans to interview C.A. However, after the interview, Ayers called and reported that C.A. admitted the abuse to her. Investigator Batson said that, since no social worker was available from the DCS, he interviewed C.A. himself.

On cross-examination, Investigator Batson said that he did not "[r]emember ever conducting an interview [pertaining to child sexual abuse] by [him]self before." On recross-examination, Investigator Batson stated that, when he left the room after the second interview with C.A., C.A. whispered into the tape recorder "something" like "'Matthew, I miss you.'"

Special Agent Timothy Forestall from the Federal Bureau of Investigation of Tallahassee, Florida testified that he worked with the FDLE in July 1998 on the Defendant's case. Agent Forestall said that they had the Defendant in custody and that they advised him of his rights. The Defendant read the *Miranda* rights waiver form and then signed it without asking for an attorney. Agent Forestall and Agent Ellis first interviewed the Defendant for three hours on Friday, July 17, 1998. The Defendant brought up C.A.'s name for a "small portion" of the interview. Agent Forestall admitted that there "was some profanity used here and there" but "it wasn't cursing." He also stated that the Defendant "was never threatened." The Defendant told them he had been awake for "thirty hours or something to that effect." At the end of that first interview, the Defendant "asked [the officers] if [they] could come back [the next day] to continue" the interview. Agent Forestall testified that he did not request the Defendant be put on suicide watch.

The second day of interviewing began with Agent Forestall re-advising the Defendant of his rights. The Defendant again did not ask for an attorney and signed the waiver of his rights to an attorney and to remain silent. Agent Forestall said he did not perceive either himself or Agent Ellis as physically intimidating to the Defendant. This second interview lasted "probably another three

hours or so," and most of the interview focused on C.A. The Defendant said that, when he went to C.A.'s home, C.A. performed fellatio on the Defendant to the point of ejaculation. Agent Ellis asked the Defendant to write down his statement about C.A. Agent Forestall said they told the Defendant that, whether or not he talked, they would interview C.A.

On cross-examination, Agent Forestall admitted that he knew the Defendant had been awake for a lengthy period of time when they interviewed him the second time. He also said that he told the Defendant that "any cooperation would be made known to the U.S. Attorney's office." Agent Forestall said that Agent Ellis conducted a third interview of the Defendant on his own.

Special Agent Michael Ellis of the FDLE testified that he worked with Agent Forestall to help arrest the Defendant. Agent Ellis confirmed Agent Forestall's testimony with respect to the first two interviews that they conducted with the Defendant. Agent Ellis stated that he did not tell the guards to put the Defendant on suicide watch. He also stated that, after the second interview, he provided the Defendant with a writing pad and pen to make a written statement with the understanding that he alone would return the next day for a third interview.

On Sunday, the third day of interviewing the Defendant, the Defendant "volunteered the papers [he had written] for [Agent Ellis] to look at and read." Agent Ellis read the Defendant's statement, and then the Defendant signed and dated it. Agent Ellis also signed and dated it, along with a jailor, who was acting as a witness. At trial, Agent Ellis read the Defendant's statement into evidence. In that statement, the Defendant admitted to participating in sexual acts with C.A.:

> The reason I agreed to do this was in the hope that what I said here could actually make a difference.
>
> [C.A.]: One of the most <u>emotionally</u> abused kids I had ever met. He would do anything for attention. I believe he started the sexual contact with me for the attention only. He got what he wanted. He had the ability to make me do something I didn't really want to do. (most of the time). <u>HE</u> could make <u>ME</u> do what <u>HE</u> says. If I didn't do what he asked, he would threaten to tell his mother and father what had been happening, even though it was done under a threat. I really felt sorry for him. He did not take care of himself, or anything he had. At 4 years old, he had to get up on his own, take a shower, and then attend school. He was never taught to clean himself, and he usually had an unpleasant odor. I never wanted to do anything with him in the first place. If I hadn't been scared I would have got in trouble, I'd have never, ever done it. He told me he loved me. I wasn't sure if he even knew how.

(Emphasis in original).

On cross-examination, Agent Ellis said that he did not have the Defendant sign a third waiver of his rights on Sunday "[b]ecause we had an agreement when we left each other on Saturday that we would meet again." Agent Ellis acknowledged that it was "entirely possible" that Agent Forestall told the Defendant that he was a "fucked up person" and a "screwed up person." Agent Ellis said that, after interviewing the Defendant, he interviewed the Defendant's family and friends and spoke with C.A.'s mother.

The Defendant then presented the following evidence: Deanna Groves, a social worker who worked on C.A.'s case on behalf of DCS, testified that she interviewed C.A. During that interview, C.A. said the Defendant never "touched [him] in [his] private parts." After that initial interview, Groves referred C.A. to Our Kids' Clinic in Nashville, Tennessee, for a physical exam.

Andrea Graves, a case worker with DCS, testified that the Ayers family was referred to her in October 1997 for physical abuse to C.A. by his father, Cory Ayers. She investigated and concluded the incident did not constitute abuse.

The Defendant testified that he grew up in Clarksville, Tennessee. In February 1996, at age nineteen or twenty, he moved in with Michelle Ayers for a month-and-a-half. During that time, Michelle Ayers became pregnant with a child that was "probably" the Defendant's. The Defendant soon moved down the street to live with Daniella Farr and her family.

Speaking of his relationship with the Ayers family, the Defendant explained that he met Michelle Ayers and her husband, Cory, on an internet bulletin board. The Defendant said he was closer to Michelle Ayers, but he talked more frequently with Cory. "Cory was a very intelligent person and I admired his intelligence. He had one of the best intellectual minds I have ever encountered and I loved talking to Cory." The Defendant considered Cory one of his "best friends." The Defendant met Michelle Ayers for coffee almost every night after work. The Defendant stated that he saw C.A. while he was at the Ayers's house, but he agreed that his "dealings with [C.A. were] fairly incidental to [his] relationship with the adults." The Defendant said he babysat C.A. two or three times, but other children were always present. The Defendant denied all sexual contact with C.A.

The Defendant then testified about his arrest: he described that he had been awake for thirty hours when he was arrested and taken into custody. During the first interview with Agent Forestall and Agent Ellis, he waived his rights. The Defendant said that he waived his rights because the agents told him that he would not be able to "clarify the misunderstanding" unless he waived them. The Defendant also consented to a search of his vehicle. When searching his wallet, the agents found a picture of C.A. and said "you molested this kid?," which the Defendant denied. The Defendant said he was asked about sexual contact "fifty, sixty, seventy times," and he consistently denied it. Agent Forestall would repeatedly hit the table in front of the Defendant and call him

names like a "worthless piece of shit." The Defendant stated that he was then transported to jail, where he was kept on suicide watch. This involved him being in solitary confinement, someone "[asking him] for information every fifteen minutes," and the lights constantly being on above the bed.

The Defendant testified that, during the second interview, he had been awake for forty-four hours. He stated that he eventually told the agents, "[F]ine. It happened." At this point, Agent Ellis commenced asking questions. The Defendant said the agents told him that, by admitting the sexual contact, C.A. would not have to be "processed." The Defendant was then returned to his cell, where he remained on suicide watch. The Defendant described that he had been without sleep for sixty to seventy hours. He said, "I was beyond rational thoughts. I mean, I remember some of the things that happened, but most of which, I don't." The Defendant stated that while he was in his cell, he drafted a written statement, which he said was collection of what he remembered admitting to during the interrogation. The Defendant testified that everything in the statement "referring to sexual contact [was] false."

On cross-examination, the Defendant testified that he met C.A. when C.A. was four years old. The Defendant said that he knew DCS had investigated the Ayers family for abusing C.A. The Defendant took C.A. to the hospital after the spaghetti scooper incident. Addressing the arrest, the Defendant testified that he waived his rights and never asked for an attorney. The Defendant also went through his written statement line-by-line, indicating the false portions.

On redirect examination, the Defendant explained that his statement was a "regurgitati[on] [of] what [Agents Ellis and Forestall] said to [him]." He also said that "[e]verytime [he] would try to go to sleep, [he] would get woke[n] up. So, whenever [he] had a thought that seemed to make sense at that time, [he]wrote it down."

Dr. William Bernet, a forensic psychiatrist at Vanderbilt University, testified about the importance of a specially trained person interviewing a possibly sexually abused child. He explained that children will often give untruthful answers that they perceive the inquirer wants. Dr. Bernet criticized the question from the first interview with C.A., "[H]as [the Defendant] ever touched you anywhere?" He said the question was leading in that it suggested that C.A. was inappropriately touched somewhere and that the Defendant did the touching. Dr. Bernet also said that it is very possible that between the event and the trial, a child could easily remember very little or be "very influenced by outside conversations." He said the earliest interview has the most credibility. Dr. Bernet also analyzed the Defendant's written statement, and he summarized it as having an "ambivalent quality." Specifically, Dr. Bernet said, "[the statement] conveys . . . that [the Defendant] is trying to write something here that he thinks is going to please the detective, but he doesn't want to go so far as to totally admit that he did something." Dr. Bernet also testified that sleep deprivation impairs judgment.

On cross-examination, Dr. Bernet testified that most of the children reporting abuse are telling the truth and that children often initially deny abuse. Again, when asked to analyze the Defendant's confession, Dr. Bernet said, "I think he was trying to write a statement that would be satisfying to the investigators so that he wouldn't be subjected to further interrogation."

After hearing the evidence presented, the jury found the Defendant guilty of one count of rape of a child. The trial court then held a sentencing hearing, where the only evidence presented consisted of the presentence report and certified copies of the Defendant's prior convictions. The trial court sentenced the Defendant to serve twenty-three years in the Tennessee Department of Correction. It is from this judgment that the Defendant now appeals.

II. Analysis

On appeal, the Defendant argues: (1) the State presented insufficient evidence to support the conviction of rape of a child; (2) the trial court erred when it admitted the Defendant's confession and statements; (3) the trial court erred when it let the jury members see the Defendant in shackles; (4) the trial court erred when it ordered the jury to deliberate after it reported that it was deadlocked; and (5) the trial court erred when it enhanced the Defendant's sentence.

A. Sufficiency of the Evidence

The Defendant argues that there was not sufficient evidence to support the conviction of rape of a child because of C.A.'s inconsistent statements throughout the investigation and the "guerilla interrogation tactics" used by the agents to elicit a confession from the Defendant. When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original); *see* Tenn. R. App. P. 13(e); *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). "Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. "'A guilty verdict by the jury, approved by the

trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.'" *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978) (quoting *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973)). The Tennessee Supreme Court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000).

The Tennessee Code Annotated defines the crime of rape of a child as "the unlawful sexual penetration of a victim by the defendant . . . if such victim is less than thirteen (13) years of age." T.C.A. § 39-13-522 (2001). "Sexual penetration" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body . . . into the genital or anal openings of the victim's . . . body, but emission of semen is not required." T.C.A. § 39-13-501(7) (2001).

In this case, the evidence, considered in the light most favorable to the State, proves the Defendant forced the victim to perform fellatio on the Defendant when the victim was between ages six and eight. The victim spat out the Defendant's semen onto the victim's shorts. Around the same time period, the victim's mother found a whitish-gray stain on the victim's shorts. The Defendant also signed a written confession that he engaged in sexual contact with the victim. The evidence shows that the Defendant engaged in fellatio with a child under the age of thirteen, which is sufficient to support a conviction of rape of a child.

B. Admission of the Defendant's Confession and Statements

The Defendant claims the trial court erred when it overruled his motion to suppress his statements and his objection to the admission of his confession. The Defendant argues that his confession was not voluntary, and, thus, it was inadmissable. The State argues that this issue was already raised and addressed on appeal, citing the Defendant's appeal of a related case. The

Defendant was initially charged with a sixty-nine count indictment. Before the counts were severed into separate trials, the Defendant filed a motion in limine to suppress his statements and confession. The trial court conducted a hearing and determined that the statements and confession were voluntary, and, thus, admissible. The Defendant raised this very issue in his appeal from the conviction on a separate count in the original indictment, and this Court affirmed the trial court's ruling that the statements and confession were admissible. *State v. Matthew Kirk McWhorter*, No. M2003-01132-CCA-R3-CD, 2004 WL 1936389 (Tenn. Crim. App., at Nashville, Aug. 30, 2004), *no Tenn. R. App. P. 11 application filed*.

"On appeal, the trial court's findings of fact at the conclusion of a suppression hearing will be upheld unless the evidence preponderates otherwise. The defendant bears the burden of demonstrating that the evidence preponderates against the trial court's findings." *State v. Harts*, 7 S.W.3d 78, 84 (Tenn. Crim. App.1999) (citations omitted). Under the "law of the case" doctrine, this court may not reconsider issues that have been previously decided. *Memphis Publ'g. Co v. Tennessee Petroleum*, 975 S.W.2d 303, 306 (Tenn. 1998). Such a rule "promotes the finality and efficiency of the judicial process, avoids indefinite relitigation of the same issue, fosters consistent results in the same litigation, and assures the obedience of lower courts to the decisions of appellate courts." *Id*. This Court has previously reviewed the issue of whether the trial court erred by admitting the Defendant's confession and statements, and it decided that the trial court did not err by admitting that evidence. *State v. Matthew Kirk McWhorter*, No. M2003-01132-CCA-R3-CD, 2004 WL 1936389, at *33-38. Since the issue of the trial court's admitting the Defendant's confession and statement has already been decided by this court, we will not reconsider this issue. The Defendant is not entitled to relief on this issue.

C. Jury's Observation of the Defendant in Shackles

The Defendant argues that his constitutional rights were violated when the jury, which had not yet reached a verdict, saw him in shackles and a prison uniform. Specifically, the Defendant claims that, because the jury was still deliberating when it saw him in shackles and prison garb and it returned a guilty verdict the next day, he was prejudiced. The State argues that the Defendant did not object at the time and that the Defendant has not proven that the jury actually saw him in shackles and prison garb.

The Defendant alleges the jury had been released to deliberate when they were driven past the Defendant, who was dressed "in full uniform and shackles," as he waited for the transport vehicle to take him back to the prison. The Defendant admits that he did not object to the jury having seen him in prison garb and shackles, and he admits that he did not raise this issue in his motion for new trial. The Tennessee Rules of Appellate Procedure state that "no issue presented for review shall be predicated upon error in the . . . misconduct of jurors, parties, or counsel, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for new trial; otherwise such issues will be treated as waived." Tenn. R. App. P. 3(d). Because the Defendant did

not challenge this issue in his motion for new trial, he has waived this issue on appeal.

D. Jury Deliberation

The Defendant claims that the trial court erred by inquiring into the jury's verdict and allowing the jury more deliberation time after the jury declared that it was deadlocked. The State argues that the Defendant waived this issue when he failed to timely object and that the trial court did not err because it did not examine the numerical division among the jurors.

After deliberating for a day, the jury sent a question to the trial court asking what happens if it cannot reach a unanimous verdict. The following portion of the transcript includes the discussion at issue:

> **The Court**: Ladies and Gentlemen, I received your message. And I want to state for the record now that you sent out a message, and I'll read it in its entirety. It says we cannot come to a unanimous decision at this point in time. What happens if a unanimous decision cannot be met? Who is the foreperson?
>
> **Mr. Barrett**: I am, Your Honor.
>
> . . . .
>
> **The Court**: Mr. Barrett, first let me ask you, sir, as foreperson, in your capacity as a foreperson, and then I'll probably address the others as well, do you believe that – well, first let me say this: The jury retired to commence its deliberations this morning at 9:50 a.m. . . . and other than taking a break for lunch . . . . [and] periodic recesses; other than that the jury has been deliberating. Do you believe – Mr. Barrett, do you believe that it's reasonable that with continued deliberations that this jury would be able – ever be able to come to a unanimous decision about this case?
>
> **Mr Barrett**: Possibly, Your Honor.
>
> **The Court**: Possible in your opinion?
>
> **Mr. Barrett**: Yes.
>
> **The Court**: Ms. – and everybody needs to say their own piece about this now, okay, your own personal opinion; and it's the same question. The question is: do you believe that it's reasonable, is it reasonable to believe – and you may think well, no, or you may think yes, or you may feel like Mr. Barrett and say well, it's possible. Do you think that it's reasonable to believe that with further deliberations this jury

would ever be able to reach a unanimous decision?

[The trial court then asked the above question of each juror. Eleven jurors said yes, they believed a unanimous decision was possible; one juror said no, she did not believe a unanimous decision was possible.]

. . . .

The Court: Okay. Well, given what you have said I'm going to . . . let you try. Now, here are your options; okay. You've been at it a long time; you can continue this evening if that's what you'd like to do . . . you can spend another night if you want and start fresh tomorrow, or you can basically do whatever [you] want to do, really.

So why don't you do this: . . . retire, consider what the Court has said, then let me know whether you want to continue on deliberating for awhile, Mr. Barrett, or what you would like to do. Is that fair enough?

Mr. Barrett: Yes, sir.

. . . .

[The jury then left the courtroom, and the following proceedings were had:]

The Court: You may be seated. All right. Don't go far, please. I anticipate getting some word from Mr. Barrett one way or the other as to what their wishes are; so I don't want to have to try to collect everybody up, so kind of stay close at hand.

[The State]: Your Honor, if they can't decide which procedure they want to follow the State's preference would be to send them back to the hotel and start at 8:30.

The Court: I agree with you. And I came close to just telling them that's what we were going to do, but I think I'm going to give them a shot to come up with their own decision.

[Defense]*:* *And I would agree, your Honor, with that.*

The Court: All right. We'll be in recess.

. . . .

[The jury was brought into the courtroom.]

The Court: All right. Mr. Barrett, what is your pleasure?

Mr. Barrett: Your Honor, our decision is to stay in the hotel tonight, take a break, get some sleep, come back first thing in the morning.

The Court: Start fresh tomorrow?

Mr. Barrett: Start fresh, yes, sir.

The Court: That's fine. That's fine. Remember your admonitions now over the

> course of the evening. You know, you've been deliberating and you might be tempted to continue to talk about the case in small groups, but you can't do that. Just stop your deliberations completely, and get you some supper, and get a good night[']s rest and we'll see you back in the morning; okay?
>
> [The jury agreed, and it left the courtroom.]

(Emphasis added).

Rule 36 of the Tennessee Rules of Appellate Procedure states that "[n]othing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." In this case, the jury reported to the trial court after a day of deliberating that it was unable to "come to a unanimous decision at [that] point in time." To be clear, the jury did not declare that it was hopelessly deadlocked and that any further deliberation would be fruitless. The trial court then asked each juror whether he or she felt a unanimous decision was possible. After hearing from the jurors, with eleven of them deciding that a unanimous decision was possible, the trial court allowed the jury to continue deliberating the following day. After the jury left the courtroom to decide whether to continue or stop deliberating, the Defendant's attorney said that he "agree[d]" with the trial court's statement that it was initially inclined to tell the jury to expect to deliberate more the next day. After some deliberation, the jury decided to continue deliberating the next day. At no point during the trial court's questioning of the foreman or the other jurors did the Defendant object. Moreover, the Defendant did not object when the trial court allowed the jury to retire for the night with the understanding that it would continue deliberating the next day. The Defendant is not entitled to relief on this issue.

E. Sentencing

The Defendant argues that the trial court erred when it sentenced him above the presumptive sentence of the sentencing range and when it ordered his sentence to be served consecutively to his other sentences. Specifically, he contends that the trial court's reliance on his prior convictions to enhance his sentence violated his constitutional right to a jury trial, because the findings of the trial court to enhance the sentence are not based on facts included in the jury's verdict. The State argues that the trial court's use of prior convictions to enhance the Defendant's sentence was proper.

When a defendant challenges the length, range or manner of service of a sentence, this Court must conduct a *de novo* review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, the burden is on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts. This means that

if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the 1989 Sentencing Act, T.C.A. § 40-35-103 (2006), we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. *State v. Dean*, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994).

In conducting a *de novo* review of a sentence, we must consider: (1) any evidence received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing, (4) the arguments of counsel relative to sentencing alternatives, (5) the nature and characteristics of the offense, (6) any mitigating or enhancement factors, (7) any statements made by the defendant on his or her own behalf and (8) the defendant's potential or lack of potential for rehabilitation or treatment. *See* T.C.A. § 40-35-210 (2006); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

1. Length of Sentence

The Defendant argues that the trial court erred when it enhanced his sentence because it relied on his prior convictions, in violation of *Blakely*, and it improperly separated two of his prior convictions that arose from a single incident when it considered his prior convictions. *Blakely v. Washington*, 542 U.S. 296 (2004).

The Defendant committed this crime between 1996 and 1998; the trial court sentenced him in 2004. In 2004, the statutory sentencing procedure instructed the trial court that, for a Class A felony, it was to begin a sentence at the presumptive minimum, which was the statutory midpoint of the sentencing range, and then increase and decrease that sentence within the statutory range corresponding to the applicable mitigating and enhancement factors. T.C.A. § 40-35-210(c) (2003); *see* T.C.A. § 39-13-522(b). One such appropriate enhancement factor was that the defendant had "a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range." T.C.A. § 40-35-114(2) (2003). The Tennessee Supreme Court has held that "The trial court's application of the enhancement factor for a previous history of criminal convictions does not offend the Sixth Amendment." *State v. Gomez*, 239 S.W.3d 733, 740 (Tenn. 2007) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

In this case, the trial court enunciated the mitigating and enhancement factors it found applicable:

> [U]nder 40-35-113, mitigating factors, sub-section (1), the Defendant's

> criminal conduct neither caused nor threatened serious bodily injury, the Court finds that that factor applies.
>
> Under . . . section . . .40-35-114, sub-section (2), the Court finds that the Defendant has a previous history of criminal convictions in addition to those necessary to establish the appropriate range. He starts at a range one and he is being sentenced as a range one, so anything over and above the conviction for which he is to be sentenced today could and would fall under sub-section (2) and the Court finds that there are three separate convictions that the Court may consider, those being identified as exhibits 2, 3, and 4.

Exhibits 2 and 3 are certified copies of the Defendant's convictions of aggravated sexual battery, both entered September 5, 2002. Exhibit 4 is a certified copy of the Defendant's conviction of traveling in interstate commerce for the purpose of engaging in a sexual act with a person under the age of eighteen, which was entered February 26, 1999. The trial court found that the Defendant was a Range I, standard offender, and that he had been convicted of a Class A felony with a range of fifteen to twenty-five years, the starting point was twenty years. The trial court then weighed the mitigating and enhancement factors and sentenced the Defendant to twenty-three years of incarceration.

We conclude that the trial court properly sentenced the Defendant to twenty-three years of incarceration. First, the trial court did not violate the Defendant's right to jury fact-finding by using his prior convictions as enhancement factors. *Gomez*, 239 S.W.3d at 740. Second, the trial court properly considered the prior convictions that arose from the same indictment as the Defendant's current conviction as separate convictions. Thus, the Defendant's three prior convictions of sexual offenses involving a minor support the trial court's enhancement of the Defendant's sentence.

2. Consecutive Sentences

The Defendant argues that the trial court erred when it sentenced him to serve his sentence consecutively to his other previously ordered sentences, in violation of *Blakely v. Washington*. 542 U.S. 296.

Rule 32 of the Tennessee Rules of Criminal Procedure states that "If the defendant had additional sentences not fully served . . . and if this fact is made known to the court prior to sentencing, the court shall recite this fact in the judgment setting sentence." The rule continues to instruct that "the sentence imposed is deemed to be concurrent with the prior . . . sentences, unless it affirmatively appears that the new sentence being imposed is to be served consecutively to the prior . . . sentences." T. R. Crim. P. 32(c)(2)(A)(i). If a trial court orders the sentences to be

consecutive, it must "explicitly relate the . . . reasons" for doing so, and such a decision is reviewable on appeal. T. R. Crim. P. 32 (c)(2)(A)(i). Although not specific to ordering sentences from different trials consecutively, the Tennessee Code instructs when the trial court may order the defendant to serve consecutive sentences from the same trial:

> The court may order sentences to run consecutively if the court finds by a preponderance of the evidence that:
>
> . . . .
>
> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;

T.C.A. § 40-35-115(b)(5) (2003). The presence of a single factor is sufficient to justify consecutive sentencing. *State v. Black*, 924 S.W.2d 912, 917 (Tenn. Crim. A pp.1995). Moreover, the Tennessee Supreme Court has recently held that "*Apprendi* and *Blakely* simply do not require the jury to determine the manner in which a defendant serves multiple sentences. That Tennessee's statutes require (in most instances) trial courts to make specific factual findings before imposing consecutive sentences does not extend the reach of *Apprendi* and *Blakely*." *State v. Allen*, 259 S.W.3d 671, 690 (Tenn. 2008). This law is applicable in a case where the trial court is deciding whether to order the current sentence be served consecutively with the defendant's prior sentences because the trial court may use any of those factors to justify imposing consecutive sentences.

The trial court in this case ordered the Defendant to serve this twenty-three year sentence consecutive to the other two sentences he was already serving based on the relationship the Defendant had with the victim and his family, which is circumstance (5) in the above list. The trial court stated:

> Under 40-35-115, ["]if a defendant is convicted of one or more criminal offenses, the Court shall order sentences to run consecutively or concurrent as provided by the criteria in this section.["] There is a set of criteria, the one that applies in this case is under sub-section (5) and it reads as follows, 'If the Defendant is convicted of two or more statutory offenses involving sexual abuse of a minor, with consideration of the aggravating circumstances arising from the relationship between the Defendant and the victim or victims' and that reference to aggravating circumstances is a – in this Court's opinion, does not trigger any Blakely considerations and the evidence supported the fact that [the Defendant] had a relationship with the entire family. He was friends with both the mother and the father. He babysat for the victim from time -to-time. He spent time with the victim

> and because of that relationship he had with [the victim], it made his – or gave him opportunity to commit this crime. The Statute goes on to say that the Court can consider the time span of the Defendant's undetected sexual activity, and the evidence is that he was – that the offense was committed sometime between June of 1996 and May of 1998. He was arrested in Florida – let's see, I believe the date of the arrest was July 17th, 1998? So – again, giving the Defendant the benefit of the time alleged, then the length of the crime being undetected would have been from May until July of 1998. And the Court can also consider the nature and scope of the sexual act, in this case, one act and if shown, the residual, physical and mental damage to the victim or victims. There hasn't been any evidence presented to the Court that there is any residual, physical or mental damage to [the victim]. The nature and scope of the sexual act was fel[l]atio as previously described by the Court.
>
> Considering all of the above, the Court finds that the sentence should be and is hereby ordered to be served consecutively to the sentences now being served by [the Defendant] in the State penitentiary.

The trial court did not violate the Defendant's constitutional right to jury fact-finding when it ordered the Defendant to serve his sentences consecutively. *Allen*, 259 S.W.3d at 690. The trial court justified ordering the Defendant's sentences (both prior and current) to be served consecutively by citing the Defendant's prior offenses involving sexual abuse of a minor while also considering the relationship between the Defendant and the victim, the time span of the abuse, the nature and scope of the acts, and the extent of damage to the victim. The trial court's decision "to impose consecutive sentences [did] not involve facts 'necessary to constitute a statutory offense.'" *Id.* (quoting *State v. Joseph Wayne Higgins*, No. E2006-01552-CCA-R3-CD, 2007 WL 2792938, at *14 (Tenn. Crim. App., at Knoxville, Sept. 27, 2007), *no Tenn. R. App. P. 11 application filed*). Therefore, the Defendant was not entitled to a jury finding of the facts upon which the trial court relied when it ordered consecutive sentencing. *Allen*, 259 S.W.3d at 690. As such, the Defendant is not entitled to relief on this issue.

III. Conclusion

After a thorough review of the record and the applicable law, we conclude: (1) the Defendant's rape of a child conviction was supported by sufficient evidence; (2) the trial court did not err by admitting the Defendant's confession and statements into evidence; (3) the Defendant waived his right to claim prejudice by the jury members allegedly seeing him in shackles and prison garb; (4) the Defendant waived his right to claim that the trial court erred by allowing the jury to deliberate after it reported being deadlocked; and (5) the trial court properly sentenced the Defendant. As such, we affirm the trial court's judgment.

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ROBERT W. WEDEMEYER, JUDGE